No. 2431

United States

Circuit Court of Appeals

For the Ninth Circuit

GLENN R. BOTHWELL, as Trustee in Bankruptcy of AMERICAN FALLS CANAL & POWER COMPANY, Bankrupt,
Appellant and Petitioner,

vs.

T. E. FITZGERALD and W. A. WEST,
Appellees and Respondents.

In the Matter of AMERICAN FALLS CANAL & POWER COMPANY, a Corporation, Bankrupt.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Idaho and upon Petition for Revision Under Section 24b of the Bankruptcy Act of July 1, 1898.

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STATEMENT OF THE CASE.

The facts substantially without dispute bearing upon the controversy here before the court may be briefly stated as follows:

I.

On the 24th day of February, A. D. 1914, the American Falls Canal & Power Company, a corporation organized under and pursuant to the laws of the State of Utah, filed its voluntary petition in bankruptcy in the District Court of the United States for the District of Utah, wherein it prayed to be adjudicated a bankrupt under the laws of the United States; thereafter on the 27th day of February, A. D. 1914, the District Court of the United States for the District of Utah, made and entered its order in said matter, adjudicating said American Falls Canal & Power Company a bankrupt, within the purview of the said laws of the United States, and referred the estate of said bankrupt to Charles Baldwin, Esquire, referee in bankruptcy of said Court, for administration. (Rec. 6-8.)

II.

After the reference of said matter to said referee, said referee caused notice to be published pursuant to law and the orders of Court, and on the 16th day of March, A. D. 1914, a meeting of the creditors of said bankrupt was held before said referee in bankruptcy, at Salt Lake City, State of Utah, and at said meeting claims were

proved and allowed by said referee; and the creditors of said bankrupt, by their votes, elected Glenn R. Bothwell, appellant, trustee in said bankruptcy matter, and upon said election said referee duly made and entered an order appointing the said Glenn R. Bothwell such trustee, and fixed his bond at the sum of $100,000.00; and thereafter, on said date, the said Glenn R. Bothwell executed and delivered said bond and did all things that were necessary to qualify him as such trustee, and he is now the duly elected, appointed, qualified and acting trustee in the matter of the bankruptcy of said American Falls Canal & Power Company. (Rec. 1-2.)

III.

The bankrupt's estate consists of real and personal property located within the States of Utah and Idaho; said bankrupt was in possession of said real and personal property at the time of said adjudication in bankruptcy, and on his appointment said Glenn R. Bothwell, trustee in bankruptcy, immediately went into the actual possession of said property. The character of the bankrupt's estate will be found fully set forth (Rec. 60-65.). It appears that the United States contracted with the State of Idaho under the provisions of the Act of Congress commonly known as the "Carey Act" (Rec. 60-61) concerning lands in the State of Idaho, and thereafter on the 23rd day of February, A. D. 1901, the State of Idaho contracted with said American Falls Canal & Power Company for the construction of a canal system for the irrigation of a particular portion of such lands. (Rec. 62.)

The lateral, No. 33, hereinafter referred to, is a part of said system.

IV.

Prior to the institution of said bankruptcy proceedings, W. A. West and Mary A. Fitzgerald (wife and assignee of T. E. Fitzgerald) had severally commenced actions at law against said American Falls Canal & Power Company in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, seeking to recover damages by reason of the alleged breach of a contract contained in a "water deed" between said American Falls Canal & Power Company and said W. A. West and T. E. Fitzgerald severally, whereby (Rec. 81-86, 87-94) the company by its deeds, similar in form and substance, dated December 8th, A. D. 1906, had warranted and conveyed to said West and Fitzgerald respectively one hundred sixty shares of perpetual water right out of the water appropriated by it from Snake river in Idaho to be used during the irrigation season between April 1st and November 1st of each year and for each and every year thereafter, together with a proportionate interest in the irrigation works, based upon the number of shares of water rights finally sold in said system, each share of water to represent a carrying capacity sufficient to deliver water at the rate of one eightieth of one second foot per acre in main canals and one fiftieth of one second foot per acre in all laterals, limiting, however, the maximum amount of water to be furnished to purchasers during any one irrigation

season to two and a half acre feet. Also therein and thereby the company agrees to carry the water to which the purchaser is entitled, under said conveyance, through its canal system, and to measure and deliver the same at a point within one-half mile from each legal sub-division of one hundred sixty acres. (Rec. 107-116; 118-132.)

Said Mary A. Fitzgerald obtained judgment, in said action at law against said company, on the 13th day of September, A. D. 1913, for $2,715.00. (Rec. 70.) After the adjudication in bankruptcy and without the trustee being substituted as party defendant, said W. A. West also obtained a judgment, in said action at law against said bankrupt company, for the sum of $2,715.00. (Rec. 71.)

V.

After the entry of said judgments, and after said American Falls Canal & Power Company had been adjudged bankrupt, and with full notice and knowledge of the adjudication of said company as a bankrupt and the appointment of the trustee in bankruptcy, said W. A. West and T. E. Fitzgerald did, on the 6th day of April, A. D. 1914, join as plaintiffs in commencing an action against said American Falls Canal & Power Company in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County. The complaint therein is set forth in full (Rec. 13-23), and the prayer of the complaint in substance is for the appointment of a receiver by said State District Court "with power to collect sufficient moneys due and owing, or to become due

and owing from the holders of water deeds entered into with the defendant corporation and to expend the same so collected as shall be necessary to complete said irrigation system and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed.'' The deeds referred to are the same deeds upon which said actions at law respectively were based.

Upon the institution of said suit, on the 6th day of April, A. D. 1914, said State District Court issued an order in said action requiring said American Falls Canal & Power Company to appear before said Court on the 11th day of April, A. D. 1914, and show cause, if any it had, why an order should not be made and entered by said Court, appointing a receiver for the purpose prayed for in said complaint. (Rec. 9-10.)

VI.

Upon receiving notice of the action mentioned in the next preceding paragraph, appellant, as trustee in bankruptcy, did file, on the 11th day of April, A. D. 1914, in the District Court of the United States for the District of Idaho, a petition (Rec. 1), setting forth that said action in said State Court had been instituted, and praying that the parties involved therein should be required to show cause before the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, why they should not be permanently enjoined from instituting a proceeding in any Court of said State of Idaho against said bankrupt, and from di-

rectly or indirectly interfering with the assets of said bankrupt, and in the meantime praying for a temporary restraining order and for other and further relief.

VII.

Also, on the 11th day of April, A. D. 1914, appellant, by his attorneys, filed a petition in the said District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, setting forth in detail the petition in bankruptcy, the adjudication by the District Court of the United States for the District of Utah, and the appointment of appellant as trustee, and suggesting the ancillary proceedings hereinbefore referred to (Paragraph VI), pending before the District Court of the United States for the District of Idaho; and requested said State District Court, Honorable Alfred Budge presiding, to stay the proceedings in said action. (Rec. 72-73.) The said State District Court did, nevertheless, on or about the 13th day of April, A. D. 1914, make and enter an order for the appointment of a receiver, with power to do things prayed for in said complaint. (Rec. 73.) Before the receiver so appointed, qualified, or said order had become effective, and on the said 13th day of April, A. D. 1914, the District Court of the United States for the District of Idaho, issued an order (Rec. 151) requiring the said W. A. West and said T. E. Fitzgerald, and their attorneys, to appear before that said Court on the 17th day of April, A. D. 1914, and show cause why they should not be enjoined from further proceeding in said suit in the State District Court, and, in the meantime, before said order could be heard, enjoining said W. A.

West and said T. E. Fitzgerald and their attorneys from further prosecuting the said proceedings in said State District Court.

VIII.

On the 17th day of April, A. D. 1914, said order to show cause came on regularly for hearing before said District Court of the United States for the District of Idaho, and after the introduction of evidence, showing the adjudication of said American Falls Canal & Power Company to be a bankrupt, the reference of said matter to Charles Baldwin, Esquire, as referee in bankruptcy, and the appointment of appellant as trustee, his qualification, and his assumption of possession of the property of said bankrupt in the State of Idaho, the said District Court of the United States for the District of Idaho made and entered the order (Rec. 154-155) enjoining and restraining said W. A. West and said T. E. Fitzgerald from proceeding further in said action in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Power, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs and the said American Falls Canal & Power Company is defendant, and further ordering said Glenn R. Bothwell, as trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, to make application for authority from the said bankruptcy Court within the district of Utah, to reconstruct and rebuild said lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company's system to the lands owned by said T. E. Fitzgerald and W. A.

West, for the proper irrigation of said land, pursuant to the contracts attached to the complaint in said action in the State Court of Idaho, the expense of said reconstruction to be paid as directed by said bankruptcy Court, and further ordering the said Glenn R. Bothwell, as trustee, to report back on the 5th day of May, A. D. 1914, to the District Court of the United States for the District of Idaho his proceedings in the matter. (Rec. 155.)

IX.

Pursuant to the order set forth in the next preceding paragraph, said Glenn R. Bothwell, as such trustee, and by way of compliance with said order, presented to the District Court of the United States in and for the District of Utah his petition and exhibits, including all proceedings in the District Court of the United States for the District of Idaho (Rec. 59-156), wherein the entire matter was set out in full and whereby appellant prayed the said District Court of the United States in and for the District of Utah, as the bankruptcy Court of primary jurisdiction, among other things:

> "That if the Court should determine it proper and within the power of your petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner to reconstruct said lateral No. 33, as suggested in the order made by said United States District Court for the District of Idaho, and for that purpose that the Court determine the nature and extent and the amount of money to be expended for such construction work, and that the Court determine at whose expense and in what manner such work should be done." (Rec. 79.)

X.

In order to comply with the further provision of said order of the District Court of the United States for the District of Idaho, dated the 17th day of April, A. D. 1914, the said Glenn R. Bothwell, trustee in bankruptcy, presented to said District Court of the United States for the District of Idaho, a report as provided in said order (Rec. 57-58), which report embodied a copy of the petition to the District Court of the United States for the District of Utah aforementioned.

XI.

Upon the presentation of the said report mentioned in the next preceding paragraph, the District Court of the United States for the District of Idaho, entered an order dated the 4th day of May, A. D. 1914, (Rec. 156-157), whereby the injunctive relief granted by the said Court on the 17th day of April, A. D. 1914, was set aside and all other injunctive relief was denied; thereupon Glenn R. Bothwell, trustee in bankruptcy, feeling aggrieved by said order denying injunctive or any relief, has brought said matter both by Appeal and Petition for Review to this Honorable Court.

SPECIFICATION OF ERRORS.

This matter has been brought before this Court both by Petition for Appeal and by Petition for Revision; the assignments of error on the Petition for Appeal being as follows:

1. The Court erred in vacating and setting aside, by its order or decree of May 4th, 1914, the injunction granted by its former order or decree herein dated April 17th, 1914, enjoining and restraining T. E. Fitzgerald and W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs and said American Falls Canal & Power Company is defendant.

2. The Court erred in denying, by its order or decree of May 4th, 1914, the injunctive relief prayed for by Glenn R. Bothwell, trustee in bankruptcy of said American Falls Canal & Power Company, by his petition filed herein on the 11th day of April, A. D. 1914, restraining and enjoining T. E. Fitzgerald and W. A. West from proceeding in any State Court of the State of Idaho against said trustee in bankruptcy or said American Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of said bankrupt.

3. The Court erred in its finding or recital contained

in its order or decree herein, made and filed May 4th, 1914, wherein it is recited:

> "And it further appearing to the Court that there is danger that unless said lateral is constructed without delay, said Fitzgerald and said West will not be able to irrigate their lands during the irrigating season for 1914."

In that, there was no evidence whatsoever to support said finding or recital. On the contrary, as it appears by the record herein, there was no legal basis or foundation to support said finding or recital; and further that the entire subject matter involved in said finding has been submitted to and was then before the District Court of the United States in and for the District of Utah, as the primary court of bankruptcy, and was there pending and had not been passed upon or determined.

The enumeration of errors under the Petition for Revision under Section 24 of the Bankruptcy Act of 1898, is as follows:

1. The Court erred in vacating and setting aside, by its order or decree of May 4th, 1914, the injunction granted by its former order or decree herein dated April 17th, A. D. 1914, enjoining and restraining T. E. Fitzgerald and W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, and the said American Falls Canal & Power Company is defendant.

2. The Court erred in denying by its order or decree of May 4th, A. D. 1914, the injunctive relief prayed for

by Glenn R. Bothwell, trustee in bankruptcy of the said American Falls Canal & Power Company by his petition filed herein on the 11th day of April, A. D. 1914, restraining and enjoining T. E. Fitzgerald and W. A. West from proceeding in any State Court of the State of Idaho against said trustee in bankruptcy or said American Falls Canal & Power Company, bankrupt, and from directly or indirectly interfering with the possession or disposition of the assets of the said bankrupt.

3. The Court erred in not granting an unconditional order, permanently enjoining and restraining the said T. E. Fitzgerald and the said W. A. West from proceeding further in the action pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, and from in any way interfering with the possession or disposition of the assets of the said bankrupt.

4. The Court erred by including in its said order dated the 17th day of April, A. D. 1914, the further words following, to-wit:

> "It is further ordered that the said Glenn R. Bothwell, as Trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, make application at once for authority from the said Bankruptcy Court within the District of Utah to reconstruct and rebuild said lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company's system to the lands owned by the said T. E. Fitzgerald and W. A. West for the proper irrigation of said land, pursuant to the contracts attached to complaint in said action and to the petition herein, as Exhibit 'B,' the

expense of such reconstruction work to be paid as directed by said bankruptcy court; and

"It is further ordered that the said Glenn R. Bothwell, as such Trustee, report to this Court his proceedings in the matter on the 5th day of May, A. D. 1914, at the hour of ten o'clock, a. m."

To the end that confusion may be avoided and time and space economized, and for the better convenience of the Court, inasmuch as the errors herein enumerated grow out of the same state of facts, but one argument is submitted by appellant.

ARGUMENT.

THE ORDER REVOKING THE INJUNCTIONAL ORDER SHOULD BE REVERSED, AND THE ORDER OF INJUNCTION BE CONTINUED.

In discussing the question presented, it seems quite proper to call the attention of this Court to some now well settled and familiar principles.

Upon the adjudication of the American Falls Canal & Power Company, a bankrupt, by the United States District Court for Utah, all of the property of said bankrupt, wherever situated within the limits of the United States, in the actual possession of the bankrupt at that time, passed into the custody of the said bankruptcy Court, and title thereto and possession thereof passed to the trustee upon his appointment and qualification.

> "It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. * * * The exclusive jurisdiction of the Bankruptcy Court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition."
>
> Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S. 300, 307.

The rule has been well stated in re Rodgers (C. C. A. 7th, Cir.), 125 Fed. 169, 180:

> "The filing of a petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by law for the benefit of creditors, and an appropriation of it to the payment of the

debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."

Edward Murphy vs. John Hofman Co., 211 U. S. 562, 569-570;

U. S. Fidelity & Guar. Co. vs. Bray, 225 U. S. 205, 217;

Robertson vs. Howard, 229 U. S. 254, 260, 261;

Hebert vs. Crawford, Trustee, and Leblanc, 228 U. S. 204;

Morehouse vs. Giant Powder Co. (C. C. A. 9th Cir.), 206 Fed. 24;

In re Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. 625.

The finding of the Court in the particular case is:

"And it appearing to the Court that said bankrupt was possessed of property located within the State of Idaho, and that the legal title and possession of said property was in the trustee prior to the institution of said proceedings." (Rec. 51.)

W. A. West and T. E. Fitzgerald had in the year 1906, contracted with the American Falls Canal & Power Company (now bankrupt), for the purchase of certain shares of water rights from the company's water system in the State of Idaho. After the American Falls Canal & Power Company had been adjudicated a bankrupt by the United States District Court for Utah, and after the trustee in bankruptcy had been appointed and after said West and Fitzgerald had knowledge of such appointment, they commenced on the 6th day of April, A. D. 1914, an

action in the District Court of the State of Idaho. In said action they allege: "That unless a receiver is appointed by this Court and authorized to take possession of this system and administer and complete the same, these plaintiffs, and each of them, and the other water-right holders under said system who have not received water in accordance with their water deeds, will suffer great and irreparable injury and loss. * * * That the amounts of deferred payments due or to become due on said deeds amounted to several hundred thousand dollars," etc., etc. (Rec. 22.) And the prayer is: "That some competent and proper person be appointed receiver by the Court, with power to complete said system and with full power to collect sufficient moneys due and owing or to become due and owing from the holders of water deeds entered into with said defendant corporation, and to expend the same so collected as shall be necessary to complete said irrigation system, and especially said lateral No. 33, so that said plaintiffs and each of them may be supplied with the amount of water to be delivered to him as required by his said deed." (Rec. 23.)

While the jurisdiction of the primary Court of bankruptcy in the administration of the bankrupt's estate is co-extensive with the limits of the United States, yet such Court cannot send its process outside of the limits of its district; and consequently ancillary proceedings are essential to be exercised by the District Courts of the United States in other jurisdictions in aid of the trustee in bankruptcy.

Babbitt, Trustee, vs. Dutcher, 216 U. S. 102;
Elkus, Petitioner, 216 U. S. 115;
Staunton vs. Wooden (C. C. A. 9th Cir.),
179 Fed. 61, 63, 64.

After the decision of those cases, Congress "passed the act of June 25, 1910, 36 Stat. 838, c. 412, amending the Bankruptcy Law specifically giving ancillary jurisdiction over persons and property within their respective territorial limits to the District Courts of the United States in aid of the receiver or trustee appointed in bankruptcy proceedings pending in another court of bankruptcy. Statutes of the United States of 1909-1911, part 1, page 838."

Acme Harvester Company vs. Beekman Lbr.
Co., 222 U. S. 300, 311, 312.

The United States District Court for the District of Utah, being unable to send its process into the District of Idaho to halt the proceedings instituted by West and Fitzgerald and to protect the rights of the bankrupt's estate as contemplated by the Act of Congress, the trustee in bankruptcy duly applied on the 11th day of April, A. D. 1914, by petition (Rec. 1-5), to the United States District Court for the District of Idaho, in the exercise of its ancillary jurisdiction vested in it by the Bankruptcy Act, for injunctive relief staying and enjoining the prosecution by West and Fitzgerald of the action brought by them in the District Court of the State of Idaho. The United States District Court for the District of Idaho thereupon issued an order to show cause and temporary restraining order (Rec. 39-41), and upon the hearing of

such order on the 17th day of April, A. D. 1914, granted an injunction restraining West and Fitzgerald from further prosecuting the action in the State Court until the further order of the Court. (Rec. 51-52.)

We are not concerned with a case brought by a creditor in a State Court prior to four months preceding the adjudication in bankruptcy, or within the four months period. In the latter case, however, it is proper to restrain any interference with the debtor's property, as decided by this Court.

In re Jersey Island Packing Co., 138 Fed. 625.

What we are concerned with is the attempt of West and Fitzgerald through the State Court of Idaho to wrest from the possession of the trustee in bankruptcy certain of the debtor's property by a suit in equity brought after the adjudication in bankruptcy and the appointment and qualification of a trustee. In such case a restraining order should issue for the protection of the estate and continue pending the final determination of the bankruptcy proceedings.

George B. Matthews & Sons vs. Joseph Webre Co., 213 Fed. 396;

In re Printograph Sales Co., 210 Fed. 567;

Keegan vs. King, 96 Fed. 758;

In re Frazin & Oppenheim, 174 Fed. 713;

In re Duble, 117 Fed. 794;

White vs. Schloerb, 178 U. S. 542.

In Keegan vs. King, supra, at page 760, Judge Baker pertinently says:

> "The property in controversy being in the actual custody and possession of an officer of this court at the time the suit was brought in the state court, neither that court, nor any person acting under any process issued from that court, can, without the permission of this court interfere with it; and to so interfere would be a contempt of the authority of this court. This principle is thoroughly settled by the supreme court of the United States in the cases of Peck v. Jennes, 7 How. 612, 625; Williams v. Benedict, 8 How. 107, 112; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, 14 How. 368, 374; Taylor v. Carryl, 20 How. 583, 594, 597; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334. And this is true, even though the property may actually remain in the hands of the bankrupt. In re Rosenberg, Fed. Cas. No. 12,055, 'A departure from this rule' as was well said by the supreme court in Buck vs. Colbath, supra, 'would lead to the utmost confusion and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject matter of the suit?' This court, through its receiver and trustee, having been in actual custody and possession of the property in controversy as the property of the bankrupt before the institution by the defendants of their suit in the state court, it is clearly the duty of this court to maintain such custody and possession, and to permit no other court to interfere therewith by injunction or otherwise."

The order to show cause why an injunction should not issue (Rec. 39-41) was made returnable on the 17th day of April, A. D. 1914. On the return day Fitzgerald and West made answer to the order to show cause. (Rec. 53-55.) In their answer they admitted that they

had commenced an action in the District Court of the Fifth Judicial District of the State of Idaho against the American Falls Canal & Power Company; admitted that a copy of the complaint attached to the petition was a true copy of the complaint filed in said cause; also admitted that in and by said action they were endeavoring to secure the appointment of a receiver to complete lateral No. 33 of the canal system of said company and "to have said receiver authorized and directed to collect certain deferred payments from water-right holders in an amount sufficient to complete said lateral, not to exceed the sum of $2,500.00."

Upon the showing made by the petition of the trustee in bankruptcy and the exhibits attached thereto and the answer of West and Fitzgerald, it clearly became the duty of the United States District Court for the District of Idaho, in the exercise of its ancillary jurisdiction, to issue an injunction restraining West and Fitzgerald from the further prosecution of said action in the State Court of Idaho.

Such an order was issued on the 17th day of April, A. D. 1914, in the following words: (Rec. 51-53.)

> "It is ordered, That said T. E. Fitzgerald and W. A. West be, and they are hereby enjoined and restrained from proceeding further in said action in the District Court of the Fifth Judicial District of the State of Idaho in and for Power County, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, until further order of this Court."

To that extent the Court acted within its jurisdiction and did its clear duty in issuing said order.

Morehouse vs. Giant Powder Co. (C. C. A. 9th Cir.), 206 Fed. 24.

In and by the same order, however, the Court further ordered:

> "That the said Glenn R. Bothwell, as trustee in the Matter of the Bankruptcy of the American Falls Canal & Power Co., make application at once for authority from said Bankruptcy Court within the District of Utah, to reconstruct and rebuild said Lateral No. 33 in such a manner as to convey water from the main canal of the American Falls Canal & Power Company System to the lands owned by said T. E. Fitzgerald and W. A. West for the irrigation of said lands pursuant to the contracts attached to the complaint in said action and to the Petition herein as Exhibit "B," the expense of such reconstruction work to be paid as directed by said Bankruptcy Court; and
>
> "It is further ordered, That the said Glenn R. Bothwell, as such trustee, report to this Court his proceedings in the matter on the 5th day of May, 1914, at the hour of ten o'clock A. M."

Respecting this further order above quoted, if its meaning and effect were intended to control the trustee, it should be borne in mind that in proceedings in bankruptcy "the supervision and control of trustees and others who are employed to assist them" are exclusively under the control of the Court of Bankruptcy having primary jurisdiction.

U. S. Fid. & Guar. Co. vs. Bray, 225 U. S. 205, 217;

Robertson vs. Howard, 229 U. S. 254, 261.

Hebert vs. Crawford, Trustee, and Leblanc, 228 U. S. 204.

The Court of bankruptcy in Utah, therefore, ac-

quired full jurisdiction of the supervision and control of the trustee.

The trustee in bankruptcy, the appellant here, however, wholly complied with the intent, spirit and purpose of said additional order, and to that end said trustees accordingly petitioned the Court of Bankruptcy of Utah. The petition and all of the exhibits thereto are set forth in the Record at pages 59 to 155. Thereupon the trustee made a report to the United States District Court for the District of Idaho accompanied by a copy of the petition and exhibits as theretofore presented to the Bankruptcy Court of Utah; (Rec. 57-58) said report showing that the petition had been duly presented to the Court in Bankruptcy and that said Court had taken the matter under advisement.

Upon the filing of said report, with copy of petition and exhibits, and on the same day, towit, the 4th day of May, A. D. 1914, the United States District Court for the District of Idaho entered its order vacating and setting aside the order of injunction theretofore granted. (Rec. 156-157.) The order is as follows:

> "It is therefore ordered that said former order, dated April 17, 1914, be, and the same is hereby, vacated and set aside, and the injunctive relief prayed for by the trustee in bankruptcy is denied."

It is from this last order that the trustee has appealed and also petitioned for revision.

We submit that upon the record it is impossible to find any legal or judicial ground upon which to predicate or justify the order revoking the injunction.

This Court, however, has been removed from the realm of speculation by the fact that the Court below in its order denying to the appellant a supersedeas herein pending this appeal took the oportunity to place upon the record the reason which moved the Court to vacate the injunction and make the order under review here. In the order dated May 5th, A. D. 1914, denying a supersedeas (Rec. 162, 163) the Court states:

> "The denial of the *supersedeas* is put upon the ground specially that the original injunction or restraining order which was vacated by the order appealed from was not signed *after a consideration of the merits of the application therefor*, but upon the assent of counsel for West and Fitzgerald, upon the condition and with the understanding on the part of the Court, that the trustee would, without delay, seek authority from the Utah court to construct the laterals referred to in the record, as he is directed to do in the order. *The trustee having now failed to comply with such direction, and having pursued a contrary course, it is thought that it would be improper to continue in force the original order.*" (The italics are ours.)

The crux of the matter appears to be that the application made by the trustee to the Court of bankruptcy *re* lateral No. 33 did not meet the expectations of the learned Judge of the Court below. The direction was to "make application at once for authority from said bankruptcy court within the District of Utah to construct and rebuild said Lateral No. 33, etc." The Court made that order, as was later made to appear, without any consideration of the merits. The trustee, pursuant to said order, by petition laid all the facts in respect to lateral No. 33 and the connection of West and Fitzgerald there-

with before the Court of bankruptcy. That petition, together with the exhibits accompanying the same, contained a full, complete and exhaustive report to the bankruptcy Court. (Rec. 57-155.) In connection with said petition, the trustee, *inter alia,* prayed: (Rec. 79.)

> "That if the Court should determine it proper and within the power of your petitioner, as such Trustee in bankruptcy, so to do, authority be given to your petitioner to reconstruct said lateral No. 33, as suggested in the order made by said United States District Court for the District of Idaho, and for that purpose that the Court determine the nature and extent and the amount of money to be expended for such construction work, and that the Court determine at whose expense and in what manner such work should be done."

Turning to the petition setting up the facts, as ascertained by the trustee, it appears, among other things, by paragraph XVI (Rec. 68, 69), that Mary A. Fitzgerald, wife of T. E. Fitzgerald, and at that time assignee of said T. E. Fitzgerald, procured from the American Falls Canal & Power Company an extension of time of payments under said contract or deed and in consideration of such extension said company was released "from any and all claims for damages arising from any failure on their part to perform any of the conditions of the above-mentioned contract to this date." Said contract is dated November 9, 1909, and is signed, "Mrs. T. E. Fitzgerald, per T. E. Fitzgerald, Her Attorney-in-Fact," and is set forth in full (Rec. 105-106).

Moreover, the petition to the bankruptcy Court further shows that Mary A. Fitzgerald and W. A. West did

each on the 22nd day of March, A. D. 1913, bring an action at law against said American Falls Canal & Power Company in the District Court of the Fifth Judicial District of the State of Idaho seeking to recover damages for the alleged loss of trees and crops, etc., during various seasons alleged to be due to the failure of said company to properly construct said lateral No. 33, and that each recovered judgment against said company in the sum of $2,715.00 with costs. (Rec. 69, 70, 71, 107-116, 118-132.)

Moreover, it is further shown from the facts alleged in said petition to the bankruptcy Court, that at least *prima facie,* not only lateral No. 33, but the whole water system had been constructed according to contract between the State of Idaho and the American Falls Canal & Power Company, and that the same had been passed upon and accepted by the State Engineer of Idaho and that the settlers had assumed the control and operation of said system in the year 1910. (Rec. 66-69.)

Surely, it cannot be possible that the Court revoked the injunction because the trustee in bankruptcy, the appellant here, in petitioning the Court of bankruptcy, pursuant to the direction of the Court below, set forth in his petition all the facts within his knowledge as such trustee, ascertained from a thorough investigation of the matter, bearing upon the question of the construction or repair of lateral No. 33, so as to enable the Court of bankruptcy to *advisedly* act upon the petition.

Surely, it cannot be that the Court below, without any consideration of the merits, arbitrarily revoked the

order of injunction because the trustee in bankruptcy did not seek permission from the bankruptcy Court to construct or reconstruct lateral No. 33, without disclosing to the bankruptcy Court the actual facts and circumstances as the trustee understood them to be in relation to said matter.

Surely, it cannot be that the injunction was revoked because the trustee prayed, in connection with his petition to the bankruptcy Court, in addition to the prayer just quoted:

> "That the Court set this petition for a hearing at a a day certain, and that the Court designate the parties upon whom notice of hearing of this petition shall be served, and the time and manner of such service." (Rec. 78.)

Or:

> "That the Court adjudge and decree the claims of the said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald wholly invalid." (Rec. 78.)

Or:

> "For any other and further relief in the premises as may to the Court seem meet and equitable." (Rec. 80.)

Or:

> "That in the event the Court shall determine that any of the claims of said W. A. West, Mary A. Fitzgerald and T. E. Fitzgerald are defensive to the equity of your petitioner in and to said contracts, or are defenses at all under said contracts, that the equity and right of your petitioner in and to said contract be converted into cash, that said equity be sold free and clear of all defenses, etc." (Rec. 79.)

The prayer of the petition should be unimportant, for relief will be directed as the facts may warrant.

It is inconceivable that, without consideration of the merits by the District Court of the United States for the District of Idaho or by the District Court of the United States for the District of Utah, the former Court would arbitrarily insist upon the construction or rebuilding of lateral No. 33, regardless of judicial determination upon full hearing by a Court of competent jurisdiction as to whether or not West and Fitzgerald were entitled to have the same rebuilt.

Is it possible that the Court would permit not only the purposes of the Bankruptcy Act to be defeated, but the rights of creditors jeopardized, by countenancing the further prosecution of said suit pending in the District Court of the State of Idaho?

We seriously insist that the duty of the Court below was to maintain said injunction, and thereby prevent the State Court from wresting the assets of the bankrupt's estate from the possession and control of the trustee in bankruptcy, thereby defeating the beneficial purposes contemplated by the Bankrtupcy Act.

Even if the trustee did not, in the opinion of the Court below, strictly comply with the direction of that Court in respect to applying for authority for specific performance of the West and Fitzgerald contracts, yet that fact would afford no legal ground for vacating the injunction. Neither judicial discretion, nor failure of the Court below to consider the merits is any justification.

> "Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet

always with reference to the facts of the particular case."

Hennessy vs. Woolworth, 128 U. S. 438, 442

"The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary or whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practice of equity jurisprudence."

Shubert vs. Woodward (C. C. A. 8th Cir.), 167 Fed. 47, 54.

Again, as said by the Court, speaking through Sanborn, J., in Shubert vs. Woodward (C. C. A. 8th Cir.), supra, at page 52, et seq.:

"A hearing by a federal court in equity at which the admissible evidence of a litigant is disregarded and an order or decree is rendered against him is no less a hearing in equity than one in which his evidence is considered, and the orders granting the injunction were appealable.

"Moreover, whether the court below considered the affidavits and letters or not, the appellate court may not lawfully disregard them, because upon an appeal in equity the question always is in a national appellate court whether or not the order or decree challenged is sustained by the competent and relevant evidence presented by the record before it." Citing: Blease vs. Garlington, 92 U. S. 1, 8; First Nat. Bank vs. Abbott (C. C. A.), 165 Fed. 852; Missouri American Electric Co. vs. Hamilton Brown Shoe Co. (C. C. A.), 165 Fed. 283; Druetzer vs. Frankfort Land Co., 65 Fed. 642, 644.

Bearing upon the question whether the order appealed from is subject to review upon appeal, see also:

Pacific N. W. Packing Co. vs. Allen (C. C. A. 9th Cir.), 109 Fed. 515;

N. Pac. Ry Co. vs. Pac. Coast Lumber Co.
(C. C. A. 9th Cir.), 165 Fed. 1.

We need not go into the merits or niceties of the question as to whether an Appeal or Petition for Revision is the proper method of bringing this matter before this Court for review, for the reason that in this case a Petition for Revision as well as an Appeal has been duly prosecuted, and we respectfully submit that whichever remedy is entertained by this Court that the order revoking the injunction should be reversed and the injunction as heretofore ordered should be continued.

Respectfully submitted,

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